United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 75-4037

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United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BAUSCH & LOMB, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's findings that Bausch & Lomb violated Section 8(a)(1), (3), and (5) of the Act by refusing to hire the non-supervisory employees formerly employed by General Dynamics at the North Goodman Street facility, and thereafter refusing to bargain with the Union as representative of the boilerroom employees at that location.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued on October 25, 1974 against respondent Bausch & Lomb, Inc. The Board's Decision and Order are reported at 214 NLRB No. 53 (A. 3-23).[1] This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred at Rochester, New York, where the Company is engaged in the manufacture, sale, and distribution of ophthalmic devices and related products.

I. THE BOARD'S FINDINGS OF FACT

In the summer of 1973, the Company was considering the acquisition of a building on North Goodman Street in Rochester owned by General Dynamics Corporation (A. 7; 56). At the time, General Dynamics was not using the building but was leasing portions for storage to various tenants (A. 3; 37). General Dynamics still maintained the boilerroom and the boilerroom employees were represented by the Operating Engineers Union[2] pursuant to a 1959 Board certification (A. 6-7; 27-28, 33, 37-38, 44). The current collective bargaining agreement was to expire on March 8, 1976 (A. 7; 29-30, 37, S.A. 1). Having learned of the proposed acquisition

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1 "A." references are to the pages of the printed appendix. "S.A." references are to Article I, Section 1 of the last agreement between General Dynamics and the Union covering the North Goodman Street boilerroom inadvertently omitted from the appendix and reproduced as a supplemental appendix at the close of this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2 International Union of Operating Engineers, Local 71-71A, AFL-CIO.

the Union's business manager, Ronald Bess, called Eugene Roberts, the Company's vice president in charge of corporate industrial relations regarding the Company's intentions with respect to the three engineers – Eugene Griffin, Joseph Herman, and Frank Williams – in the Goodman Street bargaining unit. Roberts said that the Company intended to place its own employees in the boilerhouse but was prepared to offer the existing unit employees jobs in maintenance or the pipe shop (A. 7-8; 38-39, 45, 63-65, 107). Bernard Simpson, supervisor of the General Dynamics unit employees and himself a member of the Union, made several similar requests for himself and his three crew members to continue as a unit. Each time he received the same response: the Company intended to use its own employees to man the boilerroom but that it might have positions for the three engineers (as well as Simpson) in its maintenance department and would welcome their applications which would be considered on an individual basis (A. 8; 59-61, 66, 71, 78, 107-108, 123, 124).

On August 21, 1973, Simpson filed a formal application with the Company for the chief engineer position in the Goodman Street boilerroom (A. 8; 109). At the same time, he was given application forms for the three engineers and was again told of the Company's policy of giving preference to its own employees and the "likelihood of staffing the boilerhouse" from within the Company's organization (A. 8; 67-68, 76, 108-109, 124). He was also told that all applications would be considered on an individual basis (A. 8; 68).

In the meantime, the Company's manager of corporate facility planning, Samuel Fruscione, recommended that the Company hire Simpson to head the boilerroom operation. Fruscione had met Simpson on several inspection trips to the Goodman Street facility and, as a result of those inspections, had concluded that "it would be advisable for Bausch & Lomb to employ someone who was familiar with the system. . . . " (A. 9; 77-80).

In early September, Fruscione called Simpson to the main building from the boilerroom to discuss his prospects with the Company. Fruscione told Simpson: "[M]ake no mistakes about it, this plant will run with or without you . . . You've got to talk for Bernie Simpson and not for anyone else. You cannot tell a company like this one what to do" (A. 9; 111-112). Simpson responded that he was not trying to tell anyone what to do, but was "only saying what [he] planned to do and that's not to become a nursemaid . . . to a crew of green men" (A. 10; 102, 112, 127). Fruscione then told Simpson: "[T]his plant is coming up, going places and it would be good for you . . . to get on the team but you must talk for yourself" (A. 9-10; 113). Simpson pointed out that his three crew members had sent in their applications and asked why no one had talked to them. Fruscione suggested that Simpson take the matter up with corporate employment manager, Raymond Anderson (A. 10; 113, 127-128).[3]

Thereafter, Simpson called Anderson and arranged an interview for his three crew members (A. 10; 114). Anderson interviewed the three engineers individually on September 24 (A. 10; 69, 92, 97, 101). He told them all essentially the same thing: that no openings then existed, that the Company's primary obligation was to its own employees, and that the men should not "put all [their] eggs in one basket" (A. 10; 92-93, 94, 97, 98, 101-102, 103). In addition, Anderson told interviewee Frank Williams that if anything came up, the Company would let the men know (A. 10; 97).

On October 4, 1973, Anderson offered Simpson a job as group leader of the boilerhouse at $192 a week. Simpson rejected this outright.

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[3] Simpson had spoken to Anderson earlier when he obtained application forms for the members of his crew (A. 8; 67-68).

Anderson then excused himself and returned in a few minutes increasing the offer to $200 a week with the title of chief engineer. Anderson told Simpson "to think it over and get back to him", and Simpson left (A. 9; 68-69, 72, 114-116, 138).

About three weeks later, Fruscione called Simpson to ask if he had been in touch with Anderson concerning the October offer. Simpson said that he had not because the offer did not appeal to him (A. 10; 116). Then, at Fruscione's request, Simpson made an appointment to meet with Ellis Faro, the Company's director of employment and compensation.[4] At that meeting, Faro informed Simpson that the Company had authorized him to offer Simpson $240 a week as manager of the boilerhouse (a supervisory position as distinguished from group leader or chief engineer, which were rank-and-file positions) with better fringe benefits (A. 10; 70, 72-75, 116-118, 128-129). Simpson remarked: "[T]he money is very satisfactory[5] but there's one more thing and I think you know what it is . . . what about my three men?" (A. 10-11; 118). Faro replied

> Bernie, will you please back off this. We can't touch any of those men . . . if we touched any of those men, we have to take the Union contract and you know that this Company has never dealt with the Union and never intends to deal with the Union. This may change some day. I am not at liberty to say . . . I am not even prepared to say whether the Company is right in this position. Now, Bernie, if you have any regard for me personally, you'll not let this out because if you do, I'll be forced to deny it. It's because of my personal regard that I have to say this but it's the truth.

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[4] Simpson knew Faro from previous employment with the Company and had renewed the acquaintanceship on one of Faro's inspection tours of the Goodman Street facility (A. 10; 71, 107).

[5] At the time, Simpson was earning $7 per week less than the offer (A. 10-11; 118).

(A. 11; 118). Simpson responded that "we're talking about men in their fifties. We are talking about men that are in the twilight of their working years and I just can't see them dumped into the street at this stage. They've stuck by me and made my job a pleasant one". With that Faro asked if the men would consider jobs in the plumbing shop or in maintenance and what they would have to have in the area of salary (A. 11; 118-119). Simpson replied that they were earning about $5 an hour. Faro then said that if the men took other jobs with the Company and were later needed in the boilerroom because Simpson's new crew was not working out, the Company "could possibly get these men back on a transfer circumventing the need to deal with the Union" (A. 11; 119).

Simpson agreed to sound out the men on the terms that were discussed and on his own behalf accepted Faro's offer. Faro promised to check with his people and get back to Simpson on the matter (A. 11; 119-120). About November 1, Faro told Simpson not to think that the Company had forgotten about his men and that they would be contacted about the middle of November concerning the job openings (A. 11-12; 120-121). Simpson relayed this information to the unit employees (A. 12; 93, 98, 102, 103, 120-121). However, despite the fact that the Company was "looking for plumbers almost anytime" and was hiring them off the street, and that Faro "felt confident" that the men could be placed "in a variety of jobs elsewhere in [the] Company", none of the men were ever contacted (A. 12; 93, 97-98, 102, 120-121, 134-135).

On Friday, December 14, the Company learned that the transfer of the North Goodman Street facility was to occur the following Monday. On the day of the transfer, Fruscione and several Bausch & Lomb employees arrived at the plant at noon (A. 12; 39-40, 80-81). Upon entering the boilerroom, Fruscione met the Union's representative, Bess, and

Simpson. Bess explained that he was there to ensure the good working order of the boilers and to help facilitate the transfer. Simpson indicated that the boilers were all in good working order (A. 12; 80-81, 121-122). At this point Bess told Simpson that he understood Simpson would be working for Bausch & Lomb with an inexperienced crew and that the job consequently would be more difficult than it had been under existing circumstances. Simpson acknowledged this. Bess then stated that if Simpson was dissatisfied with the Company's position, there was an opening in a job within the Union which Simpson could fill.[6] Simpson asked whether the job was available without regard to status of his health (he had undergone surgery the previous March for an unidentified ailment). Assured that it was, and that better wages and a union pension were included, Simpson resigned from the Company and accepted the Union's offer (A. 12-13; 40-41, 80-81, 121-122).

The Rochester city code required that the boilers at the North Goodman Street facility be operated under the supervision of a licensed engineer with a chief engineer's rating (A. 9; 53, 105-106). Without Simpson, the Company had no such licensed engineer on the premises to take over the facility (A. 13; 41, 82). Bess informed Fruscione that unless the Company produced an engineer qualified to take over the operation, Bess would be forced to shut down the boilers, an action which could cause damage to the building, since the prevailing temperature was 12 degrees (A. 13; 41-42, 51-52, 82).

Bess proposed that the operation continue under similar terms and conditions as it had under General Dynamics' ownership and offered a

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[6] Earlier Simpson had developed second thoughts about the Bausch & Lomb job and discussed the possibility of working elsewhere with Bess. At that time Bess apprised Simpson of an opening for a job apparently not so good as that offered by the Company. Simpson said he might consider the job but apparently never followed it up (A. 12; 46, 48-49, 50, 129-131).

contract to that effect. Fruscione said he lacked authority to accept such an offer and would have to discuss the matter with his superiors. He told Bess he would need an hour and a half for such discussions, Bess agreed to keep his men on the job for that period, and Fruscione left (A. 13; 41-42, 82-83). He returned about two hours later, accompanied by Robert Aubel, a licensed chief engineer employed at another Company plant. Once Aubel's engineer's license was confirmed, Bess instructed Simpson to give Aubel a brief tour of the facility and turn it over (A. 13; 42-43, 84-85).

After the transfer, the Company hired as a part-time consultant at $20 an hour one Kelly, who had worked at the General Dynamics facility for five years. Kelly put in 80 hours in the boilerroom during the first two months the Company operated the Goodman Street plant and was still employed at the time of the hearing (A. 14; 86-88, 90).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire former General Dynamics employees Eugene Griffin, Joseph Herman, and Frank Williams because of their union membership (A. 3, 14-16, 18). The Board also found that the Company was a successor employer and therefore violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union after taking over the General Dynamics North Goodman Street facility on December 17, 1973 (A. 3-4, 16-17, 19).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act. Affirmatively, the order requires

the Company to offer immediate employment to Eugene Griffin, Joseph Herman and Frank Williams as stationary engineers at the North Goodman Street facility and to make each whole for any loss he may have suffered as a result of the discrimination against him. Additionally, the Board's order requires the Company to bargain, upon request, with the Union for all boilerroom employees at the Goodman Street facility, and to post the appropriate notices (A. 3-4, 17-21).[7]

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT BAUSCH & LOMB VIOLATED SECTION 8(a)(1), (3), AND (5) OF THE ACT BY REFUSING TO HIRE THE NON-SUPERVISORY EMPLOYEES FORMERLY EMPLOYED BY GENERAL DYNAMICS AT THE NORTH GOODMAN STREET FACILITY, AND THEREAFTER REFUSING TO BARGAIN WITH THE UNION AS REPRESENTATIVE OF THE BOILERROOM EMPLOYEES AT THAT LOCATION

A. Introduction

The labor relations doctrine of successorship is designed to insure that employee rights are not curtailed by " . . . a mere change of employers or of ownership in the employing industry." *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 279 (1972). See also, *Zim's Foodliner, Inc. v. N.L.R.B.*, 495 F.2d 1131, 1140 (C.A. 7, 1974). Thus, when there is a "change of ownership not affecting the essential nature of the enterprise, the successor employer must recognize the incumbent

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[7] While concurring with Members Fanning and Penello that a bargaining order was warranted, Chairman Miller deemed it unnecessary to conclude that Bausch & Lomb was a successor employer. Rather, he would have entered the bargaining order solely to remedy the Company's "egregiously discriminatory refusals to employ union members in violation of Section 8(a)(3) of the Act". Members Fanning and Penello, while maintaining their successorship finding, agreed that a bargaining order would in any event be warranted to remedy the Company's 8(a)(3) violations (A. 4).

union and deal with it as the bargaining representative." *Tom-A-Hawk Transit, Inc. v. N.L.R.B.*, 419 F.2d 1025, 1026-1027 (C.A. 7, 1969), cited with approval in *Burns, supra*, 406 U.S. at 281. See also, *N.L.R.B. v. Polytech, Inc.*, 469 F.2d 1226, 1230 (C.A. 8, 1972); *N.L.R.B. v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1041-1042 (C.A. 6, 1972); *N.L.R.B. v. Zayre Corp.*, 424 F.2d 1159, 1162 (C.A. 5, 1970), cited with approval in *Burns, supra*, 406 U.S. at 281.

"The focus in these duty to bargain cases being whether 'the unit still represent[s] a majority of the employees,' *Burns*, 406 U.S. at 278, . . . the primary consideration is naturally the work force continuity." *Boeing Co. v. International Ass'n. of Mach. & Aero. Wkrs.*, 504 F.2d 307, 321 (C.A. 5, 1974). Accord: *Wm. J. Burns International Detective Agency v. N.L.R.B.*, 441 F.2d 911, 915 (C.A. 2, 1971) aff'd, 406 U.S. 272 (1972); *Zim's Foodliner, Inc. v. N.L.R.B., supra*, 495 F.2d at 1140. See *Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 12 (C.A. 2, 1967) ("The relevance of the successor engaging its predecessor's employees. . . . is to show similarity of operations."), cert. denied 389 U.S. 831. In fact, the finding of similarity of operation and continuity in the employing industry generally depends, at least in part, upon whether there is change in the employee complement, for a change in the employee complement as well as in the employer may mean that there is nothing left of the underlying bargaining relationship. *N.L.R.B. v. United Industrial Workers of the Seafarers International Union*, 422 F.2d 59, 62-63 (C.A. 5, 1970); *N.L.R.B. v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833 (C.A. 9, 1964).

Where an employer declines to hire employees solely because they are members of a union, however, he violates Section 8(a)(3) of the Act. Under these circumstances, a claim that no substantial continuity in the employing enterprise exists because of changes in the employee complement will be rejected. *N.L.R.B. v. Burns, supra,* 406 U.S. at 280-281, n. 5; *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.,* 417 U.S. 249, 262, n. 8; *K.B. & J. Young's Supermarkets, Inc. v. N.L.R.B.,* 377 F.2d 463, 465-466 (C.A. 9, 1967), cert. denied, 389 U.S. 841 (1967); *N.L.R.B. v. Foodway of El Paso,* 496 F.2d 117, 120 (C.A. 5, 1974). Therefore, an employer who attempts to evade the obligations of successorship by discriminating against the predecessor's employees not only will be compelled to remedy the discrimination by hiring those employees but also will be required to bargain with the representative of those employees. *K.B. & J. Young's Supermarkets, Inc. v. N.L.R.B., supra; Piasecki Aircraft Corp. v. N.L.R.B.,* 280 F.2d 575, 591-592 (C.A. 3, 1960), cert. denied, 364 U.S. 933 (1961); *N.L.R.B. v. Foodway of El Paso, supra.* See also *H.L.H. Products, Division of Hunt Oil Co. v. N.L.R.B.,* 396 F.2d 270, 272-273 (C.A. 7, 1968), cert. denied 393 U.S. 982; *Editorial "El Imparcial" v. N.L.R.B.,* 278 F.2d 184, 187 (C.A. 1, 1960).

Moreover, in *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court sustained the Board's remedial authority to issue a bargaining order first, in cases "marked by 'outrageous' and 'pervasive' unfair labor practices," such that "their coercive effects cannot be eliminated by the application of traditional remedies . . . ," in which case a bargaining order would be proper even "in the absence of a §8(a)(5) violation" (395 U.S. at 613-614); and second, where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the Union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of

erasing the effects of past practices . . . by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order . . . " (395 U.S. at 614-615). Accord: *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973); *N.L.R.B. v. Hendel Mfg. Corp.*, 483 F.2d 350 (C.A. 2, 1973).

Accordingly, under the authorities set out above, the Board's bargaining order would be appropriate on either of two grounds, both of which are premised on a discriminatory refusal to hire General Dynamics' North Goodman Street employees: first, that General Dynamic's bargaining obligation devolved on Bausch & Lomb as its successor; or second, that, even if it were not a successor, Bausch & Lomb's own discriminatory conduct in refusing to hire those employees warrants a remedial order which requires not only offering reinstatement to the employees, but also bargaining with their representative. Of course, in either circumstance, the Board would not issue such an order, unless the unit is an appropriate one and at some point the Union represented a majority of the employees in that unit. Thus, for the most part the elements supporting both rationales, as well as the available defenses, are the same. Indeed, before the Board, the Company's only defenses to a *Gissel* bargaining order were those common to both rationales, and its only separate defense to a successorship finding raised no substantial issue.[8] As we show below, substantial evidence supports the Board's finding that the North Goodman Street employees were discriminatorily denied reinstatement, and a bargaining order is appropriate.

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[8] Thus, the Company contended that there was a change in the "employing industry" which precluded a finding of successorship, because Bausch & Lomb manufactures ophthalmic equipment, rather than aircraft components, the product of its

(Continued)

B. The Company Discriminatorily Refused to Hire the Unionized General Dynamics Boilerroom Employees

Here, it is clear that the Company's refusal to hire the three former General Dynamics engineers was based on its determination to avoid bargaining with their union representative. The record reveals that before Bausch & Lomb took over the General Dynamics North Goodman Street facility, the boilerroom work force was composed of three stationary engineers (Eugene Griffin, Joseph Herman, and Frank Williams), all union members, who were covered by a contract between General Dynamics and the Union effective through March 8, 1976. The boilerroom operated

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[8] (Continued) predecessor. A change in the product produced, however, is relevant only with respect to its effect on the expectations of the unit employees. See, "The Bargaining Obligations of Successor Employers," 88 Harvard L. Rev. 759, 769 (1974) ("It seems likely that an employee would view his employment situation, and the union's role, as unaffected by a change in the product so long as his job remains practically unchanged."). Thus, where changes in product or service work a change in the skills needed by the employees or changes in working conditions, the new employer is generally found not to be a successor. See, e.g., *Georgetown Stainless Mfg. Corp.*, 198 NLRB No. 41, 80 LRRM 1615 (1972) (expensive silk plant changed to manufacture of cheap silk); *J-P Mfg., Inc.*, 194 NLRB 965 (1972) (manufacture of metal tools, dies, stamps, and precision equipment changed to manufacture of auto parts); *Galis Equip. Co.*, 194 NLRB 799 (1972) (change from 80 percent machine shop and 20 percent metal fabrication business to the reverse percentages with an emphasis on fabrication of underground mining equipment); *Union Texas Petroleum Corp.*, 153 NLRB 849 (1965) (gasoline refinery changed to petro chemical manufacturing and processing plant). Accordingly, the crucial determination is "whether the operation is 'essentially the same as that previously conducted . . . '." *Burns v. N.L.R.B., supra*, 441 F.2d at 914-915. See *N.L.R.B. v. Polytech, Inc.*, 469 F.2d 1226, 1230-1231 (C.A. 8, 1972). Here, the fact that Bausch & Lomb's production employees are producing a product wholly different from its predecessors' had no apparent effect on the skills or general working conditions of the boilerroom employees.

under the supervision of Bernard Simpson.[9] Following several inspection tours of the facility, prior to its formal acquisition, Bausch & Lomb's manager of corporate facility planning, Fruscione, concluded that the boiler operation was complex enough that "it would be advisable for Bausch & Lomb to employ someone who was familiar with the system." Despite Fruscione's advice, the Company chose not to secure the services of a fully experienced crew to run the boiler room. Rather, it offered employment only to Simpson.

When Simpson informed the Company of his reluctance to assume supervision of the operation without his experienced crew, he was advised "to talk for Bernie Simpson and not for anyone else." On another occasion the Company's director of employment and compensation Faro, pleaded with Simpson to "back off this. We can't touch any of those men . . . if we touched any of those men, we have to take the Union contract and you know that this Company has never dealt with the Union." When Simpson continued to press the issue, Faro went so far as to ask him whether the men would accept other jobs with the Company, so that if Simpson's new assistants were not performing as expected, the Company "could possibly get [the old crew] back on a transfer circumventing the need to deal with the Union."[10]

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[9] Griffin, a stationary engineer for 17 years, had worked in the North Goodman Street boiler room for two years (A. 100-101). Herman became a stationary engineer in 1969 and had worked in the boiler room for 3½ years (A. 91-92). Williams had 14 years engineering experience, four of which were acquired at the North Goodman Street facility (A. 95-96).

[10] Faro's testimony that he did not make these statements to Simpson (A. 12; 132-133) raised an issue of credibility which the Administrative Law Judge resolved against the Company after carefully weighing the conflicting evidence and the demeanor of witnesses. As this Court has repeatedly stated, "questions of credibility are for the trier of fact and . . . we will not upset . . . a finding of an Examiner which is grounded

(Continued)

In the end, however, the three engineers were not hired in any capacity, even though the Company so sorely needed maintenance personnel that it was hiring them off the street. Thus, despite a pool of experienced employees and the recognized maxim that "seasoned men are better than green hands" (*N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2, 1938)), after Bausch & Lomb took over the General Dynamics facility, it transferred from other branches of the Company an entirely new complement of employees, so unfamiliar with the workings of this boilerroom that the Company found it necessary to hire an experienced consultant to assist them in their work. See *New England Tank Industries, Inc.*, 302 F.2d 273, 276-277 (C.A. 1, 1962), cert. denied, 371 U.S. 875; *J.R. Sousa & Sons, Inc.*, 210 NLRB No. 157, 86 LRRM 1667 (1974). The pattern of staffing the North Goodman Street boilerroom was thus clearly discriminatory. See *Piasecki Aircraft Corporation v. N.L.R.B., supra*, 280 F.2d at 585; *N.L.R.B. v. Tragniew, Inc.*, 470 F.2d 669, 675 (C.A. 9, 1972), enf'g. in relevant part 185 NLRB 962 (1970); *N.L.R.B. v. Foodway of El Paso, supra*, 496 F.2d at 119-120. As the Board noted, it is no wonder that Company employment director Faro was unable or unwilling to testify why the Company did not continue the men in the job that they knew so well (A. 14, 15; 137).

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[10] (Continued) upon (a) his disbelief in [a] witness' testimony because of the witness' demeanor or (b) [his] evaluation of oral testimony as reliable" unless it is "hopelessly incredible" on its face. *N.L.R.B. v. Warrenburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965), and cases cited therein. Accord: *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970); *N.L.R.B. v. A. & S. Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833. There is no basis for overturning these determinations in the instant case.

In the face of such overwhelming evidence of unlawful motivation, the Company's asserted reason for refusing to hire the General Dynamics engineers – that it was merely following an established Company policy of filling openings from within its existing work force – is exposed as pretextual. See, e.g., *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (C.A. 2, 1971).

C. The Board Properly Ordered the Company to Recognize and Bargain with the Union

As shown in the Statement, the boilerroom employees at General Dynamics' North Goodman Street facility were represented by the Union as their bargaining agent up until the time Bausch and Lomb took over operations there. This bargaining relationship was based on a Board certification in 1959 and on several successive collective-bargaining agreements, the latest effective through March 8, 1976. There is no question of the Union's majority status at North Goodman Street at the time of the transfer of ownership; in fact, every unit employee was a Union member. Accordingly, but for the unlawful discrimination by the Company, the Union would have retained majority support after the Company took over the facility's operation. *K. B. & J. Young's Supermarkets, Inc. v. N.L.R.B., supra,* 377 F.2d at 465; *Piasecki Aircraft Corp. v. N.L.R.B., supra,* 280 F.2d at 519-592. Further, the existence of a collective bargaining agreement also warranted a presumption that the Union enjoyed majority support. *N.L.R.B. v. Valleydale Packers, Inc.*, 402 F.2d 768, 769 (C.A. 5, 1968), cert. denied, 396 U.S. 825. See *N.L.R.B. v. Master Touch Dental Laboratories,* 405 F.2d 80, 82 (C.A. 2, 1968).

It is also clear that the North Goodman Street employees possess "a sufficient community of interest to be an appropriate unit." *Wheeler Van Label Co. v. N.L.R.B.*, 408 F.2d 613, 617 (C.A. 2, 1969), cert. denied 396 U.S. 834. While the Company maintains five heating plants in the Rochester area, each operates under separate supervision and is treated independently for purposes of promotion and layoffs (A. 57-58, 59). Except in emergency situations, there is no significant interchange of employees among the plants (A. 56, 58-59). In addition, the fact that the Company found it necessary to hire an outside consultant to assist the engineers transferred from other Company locations in operating the North Goodman Street equipment demonstrates that the North Goodman Street employees possess skills different than those held by employees in other Company boilerrooms. Moreover, General Dynamics had established a practice of bargaining for the North Goodman Street unit individually and such bargaining history, if not determinative, was certainly a persuasive factor the Board could assay. *N.L.R.B. v. Zayre Corp., supra,* 424 F.2d at 1165. See Hall, "The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice," 18 Wes. R.L. Rev. 479, 497 (1967). Thus, at the time Bausch & Lomb took over the General Dynamics facility, the employees in the North Goodman Street unit, all union members, constituted a cohesive group of employees who were separately supervised, who had a separate place of work, who possessed different skills and who had a separate bargaining history of over ten years. Cf. *Emerald Maintenance Inc. v. N.L.R.B.*, 464 F.2d 698, 702 (C.A. 5, 1972).

Before the Board, the Company contended that since the General Dynamics unit as certified in 1959 covered boilerroom employees at two different locations of that corporation, a multi-plant unit is presumptively appropriate. Accordingly, the argument runs, when Bausch & Lomb acquired

the North Goodman Street facility, the appropriate unit became all the boilerroom employees at all five of its heating plants in Rochester, a unit in which the Goodman Street employees would not constitute a majority. We submit that the Board did not abuse its broad discretion in matters of unit determination,[11] under the circumstances of this case, by approving a unit limited to boilerroom employees at North Goodman Street notwithstanding it constituted only a fragment of the certified unit. Despite the original certification, beginning in 1962, as a result of a corporate restructuring, and continuing to the takeover, General Dynamics and the Union negotiated separate contracts for each of the two boilerroom locations. The pertinent contract unit covered all boilerroom employees at North Goodman Street (A. 7; S.A. 1). At no time between 1962 and Bausch & Lomb's 1973 takeover did General Dynamics or the Union seek to challenge this smaller unit or seek to revert to the original combined unit. Instead, the parties entered into collective bargaining agreements whose coverage comported with the General Dynamics corporate division. Therefore, the predecessor, by "maintaining and recognizing such a unit consensually," waived any objection to the contour changes that the unit has undergone. *International Telephone & Telegraph Corp. v. N.L.R.B.*, 382 F.2d 366, 370 (C.A. 3, 1967), cert. denied, 389 U.S. 1039. Accord: *Brewery & Bev. Drivers v. N.L.R.B.*, 257 F.2d 194-195, 196 (C.A.D.C., 1958).

The fact that the Company's proposed Company-wide unit also may have been appropriate does not indicate any abuse of discretion, for it is well-settled that the Board's choice need not be a *more* appropriate unit or the *most* appropriate unit but simply that it be *an*

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11 *Wheeler-Van Label Company v. N.L.R.B.*, 408 F.2d 613, 616-617 (C.A. 2, 1969), cert. denied 396 U.S. 834; *Continental Insurance Co. v. N.L.R.B.*, 409 F.2d 727, 727-730 (C.A. 2, 1969), cert. denied 396 U.S. 902; *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941 (C.A. 2, 1971).

appropriate unit. *Wheeler-Van Label Co. v. N.L.R.B., supra,* 408 F.2d at 617. Where, therefore, the Board correctly finds that the unit in question is an appropriate one, its finding is entitled to stand on review even though it might properly have found other units to be appropriate as well. The burden on a party challenging the unit determination thus is not merely to demonstrate that another unit is equally or more appropriate than the unit selected by the Board, but to prove that the Board's unit determination "is clearly not appropriate." See *Banco Credito y Ahorro Ponceno v. N.L.R.B.,* 390 F.2d 110, 112 (C.A. 1, 1968), cert. denied, 393 U.S. 832.[12] We submit that the Company has not met that burden here.

Finally, the Company contended that although the three employees represented by the Union would have constituted a majority at the time of the takeover from General Dynamics and at the time of the hearing. four months later, when only four employees were in the unit (A. 75, 85-86, 91), they would not have been a majority at some unspecified time in the future when the Company expected to hire more boilerroom employees and achieve its "full complement."[13] Of course, as the Board

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[12] Accord: *N.L.R.B. v. Horn & Hardart Co.,* 439 F.2d 674, 682 (C.A. 2, 1971); *N.L.R.B. v. Bayliss Trucking Corp.,* 432 F.2d 1025, 1028 (C.A. 2, 1970).

[13] In this respect the Company relied on the Supreme Court's observation in *Burns, supra,* 406 U.S. at 294-295:

> In [some] situations, . . . it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act. . . .

Clearly, nothing in *Burns* indicates that "full complement" would mean anything significantly different in this context than it does in representation matters generally. Rather, the repeated references here and elsewhere (*id.* at 279, 281) to Section 9, the representation section of the Act, refutes such a contention.

has recognized, an imminent – and significant – expansion of the bargaining unit may preclude either a certification election or voluntary recognition. In making that determination, the Board looks to see whether the current complement is "representative and substantial" (*Clement-Blythe Companies,* 182 NLRB 502 (1970), enforced, *per curiam,* 77 LRRM 2373 (C.A. 4, 1971); *Hayes Coal Co.,* 197 NLRB 1162, 1163 (1972). Thus, the Board looks to see whether the job classifications for the operation are substantially filled, so that new employees will not have dissimilar skills, and whether normal production activities have begun, even though at less than full capacity (*ibid.*). For as the Board observed in *Clement-Blythe* (182 at 502), "it would unduly frustrate existing employees' choice to delay selection of a bargaining representative for months or years until the very last employee is on board." In the present case, the Company does not suggest that new employees would occupy different classifications. Moreover, it is clear that the Company had hired what was to be its initial complement and was "running the plant" in January 1974 (A. 87, 90). On the other hand, the Company was vague as to when this unspecified unit expansion would take place, although it was clear that it had not taken place more than four months after the take over. Thus, here, the "full complement" requirement is satisfied by the Company's hiring of a "representative and substantial" employee complement at the time of the takeover.[14]

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[14] Of course, the rebuttable presumption of continued majority status past the certification year (see p. 16, *supra*) does not prevent the employer from petitioning the Board for a new election. See *Zim's Foodliner, Inc. v. N.L.R.B., supra,* 495 F.2d at 1139 and cases cited therein. The Board will grant such an election if the employer "demonstrate[s] by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification." *United States Gypsum Co.,* 157 NLRB 652, 656 (1966). This burden imposed on employers, to continue to bargain while petitioning for a new election, "is hardly severe." *Zims, supra.*

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Board's order should be enforced in full.

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May 1975

S.A. 1

AGREEMENT

Between

Electro Dynamics Division of GENERAL DYNAMICS CORPORATION
Located at 1400 North Goodman Street, Rochester, New York
(Hereinafter referred to as "the Company")

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
AND ITS LOCAL 71-71A
(Hereinafter referred to as "the Union")

– WITNESSETH –

* * * * *

ARTICLE I

RECOGNITION

Section 1.

The Company hereby recognizes the Union which has been certified by an order of the National Labor Relations Board dated May 28, 1959, as exclusive representative of all Boiler Room employees of the Company's plant at 1400 North Goodman Street, Rochester, New York, for the purpose of collective bargaining for and in behalf of said employees with respect to rates of pay, wages, hours of employment, or other conditions of employment covered by this Agreement.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	No. 75-4037
v.	)	
	)	
BAUSCH & LOMB, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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& Michael J. Doyle
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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 15th day of May, 1975.